IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
(Southern Division)

AVARY LEIGH, ***individually and on behalf of all similarly situated persons,***	)	
Plaintiff,	)	C.A. No. 8:10-cv-00218 (DKC)
v.	)	
BOTTLING GROUP, LLC ,	)	
Defendant.	)	

SECOND SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PLAINTIFF'S SUPPLEMENTAL MOTION TO APPROVE SETTLEMENT

COMES NOW the Plaintiff, Avary Leigh, on behalf of himself and all others similarly situated, by and through undersigned counsel, at the request of the Court to supplement and address the issue of reasonableness of the requested amount of attorneys' fees and expenses and therefore submits this his Second Supplemental Memorandum in Support of Plaintiff's Supplemental Motion to Approve Settlement, in which he states as follows:

In addition to the considerations Plaintiff detailed in his Memorandum of Law in Support of Unopposed Motion to Approve Settlement of FLSA Claims (Docket No. 20) (hereinafter "Plaintiff's First Memo") and also detailed in his Memorandum in Support of Plaintiff's Supplemental Motion to Approve Settlement (Docket No. 26) (hereinafter "Plaintiff's Second Memo"), Plaintiff would show that (1) the percentage of the fund method is common in FLSA attorney's awards and should be used in the case at bar, but (2) in light of this Court's opinion in *Lane v. Ko-Me, LLC*, Civil Action No. 10-2261, 2011 WL 3880427 (D. Md. Aug. 31, 2011) (copy attached hereto as "Exhibit A"), a cross-check application of a lodestar calculation also supports the attorney's fees requested by Plaintiff.

I. **Plaintiff's Attorney's Fees Should Be Based on a Percentage of the Common Fund.**

As pointed out in Plaintiff's First Memo, attorney's fees in class action settlements are often awarded as a percentage of the common settlement fund. At least eight Circuits have approved this approach in various types of class action litigation: the First Circuit in *In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 (1st Cir. 1995); the Second Circuit in *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 49-50 (2nd Cir. 2000); the Third Circuit in *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig.*, 55 F.3d 768, 821-22 (3d Cir. 1995); the Sixth Circuit in *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993); the Seventh Circuit in *Harmon v. Lyphomed, Inc.*, 945 F.2d 969, 975 (7th Cir. 1991); the Eighth Circuit in *Johnston v. Comerica Mortgage Corp.*, 83 F.3d 241, 244-46 (8th Cir. 1996); the Ninth Circuit in *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989); and the Tenth Circuit in *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988).

While the Fourth Circuit has apparently not ruled conclusively on which method to adopt in common fund cases when determining attorney's fees, the percentage-of-the-fund approach or the lodestar method, neither has this Circuit ruled that the percentage-of-the fund approach cannot be used. *See Teague v. Bakker*, 213 F. Supp. 2d 571, 583 (W.D.N.C. 2002) (noting that "[t]he Fourth Circuit has not determined the preferred method of calculating attorneys' fees where a common fund has been generated on behalf of a class"); *Goldenberg v. Marriott PLP Corp.*, 33 F. Supp. 2d 434, 438 (D. Md. 1998); *Kay Co. v. Equitable Prod. Co.*, 749 F. Supp. 2d 455, 462-64 (S.D. W. Va. 2010) (stating that "[c]ourts have increasingly favored the percentage method for calculating attorneys' fees in common fund cases," applying this method, and also using an informal lodestar cross-check). In *Goldenberg*, this Court stated as follows:

> In approving the original fee request, the Court observed that the Fourth Circuit has not decided which of the two general approaches to adopt. *But see Daly v.* Hill, 790 F.2d 1071 (4th Cir. 1986) (involving fee-shifting statute rather than common fund). A few recent decisions within this Circuit, however, have endorsed the percentage method. Thus in *Strang v. JHM Mortgage Sec. Ltd. Partnership*, 890 F. Supp. 499, 502 (E.D. Va. 1995), the Virginia Federal Court held that although the Fourth Circuit has not yet ruled on this issue, the current trend among the courts of appeal favors the use of a percentage method to calculate an award of attorneys' fees in common fund cases. In adopting the percentage method, the *Strang* court noted that "the percentage method is more efficient and less burdensome than the traditional lodestar method, and offers a more reasonable measure of compensation for common fund cases." *Id.* at 503. On the basis of this authority, the Court in the present case found the percentage method simpler, more efficient, and more accurate in terms of approximating a "fair" award. *Accord, Edmonds v. U.S.*, 658 F. Supp. 1126 (D.S.C. 1987).

33 F. Supp. 2d at 438. The *Teague* court stated that, "although the Supreme Court has not addressed the issue, it has been noted that in every case before it involving a common fund, that Court has applied the percentage method." *Id.* (citation omitted).

Finally, at least one district court in this Circuit has applied the percentage-of-the-fund approach to an FLSA collective action settlement.[1] *Kidrick v. ABC Television & Appliance Rental, Inc.*, No. 3:97CV69, 1999 WL 1027050 (N.D. W. Va. May 12, 1999) (copy attached hereto as "Exhibit B"). In *Kidrick*, the court approved the use of this method:

> The settlement of this case created a single, common fund to be used for damages, attorney's fees and expenses. Where there is a common fund in a class settlement, application of a percentage method to calculate an attorney's fee award is now favored. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Camden I Condominium Association, Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991). Calculating fees based upon a percentage of the settlement fund "is more efficient and less burdensome than the traditional lodestar method, and offers a more reasonable measure of compensation for common fund cases. *Strang v. JHM Mortgage Securities Limited Partnership*, 890 F. Supp. 499, 502-503 (E.D. Va. 1995) (citations omitted). *See also*, Court Awarded Attorney Fees, Report of the Third Circuit Task Force, 108 F.R.D. 237, 254-59 (1985) (recommending calculation of fees in common fund class settlements using a percentage of the

[1] The settlement also included a normal opt-out class action. *Kidrick*, 1999 WL 1027050, at *3.

fund).

1999 WL 1027050, at *1. In fact, the *Kidrick* court went on to find that "[a]n award of fees in the range of 30% of the fund has been held to be reasonable."[2] *Id.* at *2. Consequently, this Court has authority to use a percentage-of-the-fund approach to award fees in the instant action, and it can also look to precedent supporting the percentage amount requested by Plaintiff.

II. Plaintiff's Requested Attorney's Fees Are Appropriate Using the Lodestar Method.

While this Court may use the percentage-of-the-fund approach, Plaintiff notes that, in *Lane v. Ko-Me, LLC*, Civil Action No. 10-2261, 2011 WL 3880427 (D. Md. Aug. 31, 2011), this Court has indicated that it might use the lodestar method (The Lodestar Cross-Check Method). According to the Court,

> Accordingly, the reasonableness of the fee award proposed in an FLSA settlement must be independently assessed, regardless of whether there is any suggestion that a "conflict of interest taints the amount the wronged employee recovers under a settlement agreement." In making that assessment, courts typically "use the principles of the traditional lodestar method as a guide." The lodestar amount is calculated by multiplying the number of hours reasonably expended by a reasonable hourly rate.

Id. at *3. In addition, some courts in this Circuit have used the percentage-of-the-fund method in class action settlements, but also applied an informal lodestar cross-check. *Kay Co. v. Equitable Prod. Co.*, 749 F. Supp. 2d 455, 463-64 (S.D. W. Va. 2010) ("I will also apply the lodestar cross-

[2] Several courts have found attorney's fee awards in the range of 30% appropriate in common fund cases. *Montague v. Dixie Nat'l Life Ins. Co.*, Civil Action No. 3:09-00687-JFA, 2011 WL 3626541, at *3 (D.S.C. Aug. 17, 2011) ("A 33% fee award from the common fund in this case is consistent with what is routinely privately negotiated in contingency fee litigation.") (copy attached as "Exhibit C"); *Stefaniak v. HSBC Bank USA, N.A.*, No. 1:05-CV-720 S., 2008 WL 7630102, at *3 (W.D.N.Y. June 28, 2008) ("Class Counsel's request for 33% of the Settlement Fund is typical in class action settlements in the Second Circuit.") (copy attached as "Exhibit D"); *Rowe v. E.I. Dupont De Nemours & Co.*, Civil Nos. 06-1810 (RMB/AMD), 06-3080 (RMB/AMD), 2011 WL 3837106, at *22 (D.N.J. Aug. 26, 2011) ("[T]he Court finds an award of 33.33% to be reasonable.") (copy attached as "Exhibit E"); *In re Employee Benefit Plans Securities Litig.*, Civ. No. 3-92-708, 1993 WL 330595, at *7 (D. Minn. June 2, 1993) ("Based upon a review of cases which have awarded attorney's fees under the 'common fund' approach, the Court finds that an award of 33 1/3 % of the common fund is reasonable.") (copy attached as "Exhibit F"); *In re Cell Pathways, Inc., Securities Litig. II*, No. 01-CV-1189, 2002 WL 31528573, at *11 (E.D. Pa. Sept. 23, 2002) ("In fact, thirty percent is very close to other fee awards that have been made by courts in this District.") (copy attached as "Exhibit G").

check as an element of objectivity in my analysis."). Plaintiff, therefore, addresses the lodestar factors in relation to his attorney's fees request.

This Court has previously set out the factors to be considered in applying the lodestar method to a request for attorney's fees. Courts are to consider

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to properly perform the legal service; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Thomas v. Smith, Dean & Assocs., Inc., No. ELH-10-CV-3441, 2011 WL 2730787, at *6 (D. Md. July 12, 2011) (copy attached as "Exhibit H"). Most of these factors have been addressed in Plaintiff's First Memo and Plaintiff's Second Memo and will, therefore, not be discussed again here. Otherwise, an application of these factors to the instant case supports the attorney's fee requested by Plaintiff.

The time, labor, and expense required. Alan G. Crone is the lead plaintiff's counsel for this case. He reports that the time and value of the hours expended by plaintiff's legal team in his Third Declaration. (Exhibit J) In summary the hours and value of plaintiff's counsels' time is:

Team Member	Approx. No. of Hours[3]	Hourly Rate	Total Value
Alan G. Crone, Esq.	86.5	$350.00	$28,112.50
John Fredrickson, Esq.	14.5	$350.00	5,075.00
Kenneth E. Barnes, Esq.	61.0	$250.00	15,250.00
James J. Webb, Esq.	15.0	$250.00	3,750.00
Maggie A. Crone	31.75	$150.00	4,762.50
Total Fees			$56, 950.00

[3] These are estimated hours through the hearing on September 19, 2011.

Expenses[4]	$3,126.00
Total Lodestar	**$60,076.00**

Plaintiff's counsel was able to successfully settle this matter without higher hours because of the skill and efficiency of counsel and because the settlement reached was extremely beneficial to the putative class.

The amount involved and the results obtained. The total settlement fund in this case is Six Hundred Twenty-Five Thousand and Sixty-Six Dollars ($625,066.00). The results obtained for the plaintiff class was excellent, with opt-in plaintiffs receiving damages for longer than the applicable statute of limitations. Furthermore, Defendant altered its business practices as a direct result of this litigation. Finally, there was approximately a 34% opt-in rate in this settlement, which is higher than normal. *See Ellis v. Edward D. Jones & Co., L.P.*, 527 F. Supp. 2d 439, 444 (W.D. Pa. 2007) ("The opt-in rate in a FLSA collective action not backed by a union is generally between 15 and 30 percent."). The *Teague* court noted that the most critical factor in determining a reasonable attorney's fee award is the degree of success obtained in the case. 213 F. Supp. 2d at 583.

In addition, when applying the lodestar method as a cross-check of the percentage-of-the-fund approach, courts have applied lodestar multipliers of up to 6 times the lodestar. *Demunecas v. Bold Food, LLC*, No. 09 Civ. 00440(DAB), 2010 WL 3322580, at *10 (S.D.N.Y. Aug. 23, 2010) ("Courts regularly award lodestar multipliers from 2 to 6 times lodestar.") (copy attached as "Exhibit I"); *Jones v. Dominion Resources Servs., Inc.*, 601 F. Supp. 2d756, 766 (S.D. W. Va. 2009) ("Courts have generally held that lodestar multipliers falling between 2 and 4.5

[4] Estimated expenses through appearance at hearing and return to Memphis, Tennessee for Mr. Crone

demonstrate a reasonable attorney's fee."). Given the complexity of the case and particularly given the excellent results for opt-in plaintiffs, even a high lodestar multiplier would be appropriate in the case at bar. Although in this particular case a very modest lodestar multiplier is necessary to reach the requested fee.

The parties agreed that Plaintiff's counsel, upon approval of the court, receive an attorneys' fee of $200,000.00. Counsels' total base lodestar is $60,076.00. A 3.5 multiplier produces a total lodestar fee of $210,266. A 4.0 multiplier produces a lodestar of $240,304. Therefore, the actual multiplier at issue, 3.4, is well within the 2.5 to 4.0 range approved in most cases and considerably under the 6.0 multiplier allowed by the *Demunecas* court.

Considering that:

- ✓ the Defendant has agreed that the fee requested is reasonable and is willing to pay it;
- ✓ the fee has been published in the notice to potential opt-ins and not only has no one objected, but the settlement received an above-average opt-in rate;
- ✓ if the requested amount is reduced or otherwise not paid to Plaintiff's counsel the reduced amount will not directly benefit the opt-in plaintiffs by increasing their recovery under the settlement;
- ✓ the settlement outcome is very beneficial to the class members and the result was obtained by Plaintiff's counsel in an efficient and painless manner for the class members;
- ✓ Plaintiff and his counsel obtained an change in Defendant's compensation program relative to the positions at issue in this case in unified compliance with the FLSA;
- ✓ the requested fee satisfies both the percentage and the lodestar cross-check methods of determining reasonableness; now,

Therefore, the Court should approve this element of the settlement agreement and approve the requested fee in total ($200,000.00) to Plaintiff's counsel.

III. Conclusion.

In conclusion, this Court should apply the percentage-of-the-fund method in considering Plaintiff's fee application and award Plaintiff $200,000 in attorney's fees—a little less than a third of the settlement fund, which is a percentage commonly awarded in class action settlements. If the Court applies the lodestar method, either independently or as an informal cross-check of the percentage-of-the-fund method, it should also approve payment to Plaintiff's counsel its requested $200,000 in attorney's fees and expenses. Moreover the Court should approve the underlying settlement including the named plaintiff's

Dated: September 16, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing pleading was filed electronically and notice of such filing was made electronically to Defendant's counsel pursuant to the Electronic Case Filing Rules of the United States District Court for the District of Maryland Southern Division on September 16, 2011.

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